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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JASON R. BROOKS,

Plaintiff and Appellant,

v.

DEPARTMENT OF MOTOR VEHICLES,

Defendant and Respondent.

F055961

(Super. Ct. No. 08CECG00402)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Judge.

Law Offices of Ronald A. Jackson and Ronald A. Jackson for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Alicia M.B. Fowler, Assistant Attorney General, Vincent J. Scally, Scott H. Wyckoff and Connie A. Broussard, Deputy Attorneys General, for Defendant and Respondent.

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Jason R. Brooks's driver's license was suspended by the Department of Motor Vehicles (DMV) for driving a motor vehicle with 0.08 percent or more, by weight, of alcohol in his blood. The determination of Brooks's blood-alcohol content (BAC) was based on two breath tests conducted at the time of his arrest. Both breath tests registered a BAC of exactly 0.08 percent. Brooks petitioned for a writ of mandate in Fresno County Superior Court, contending the suspension should be overturned on the ground that the breath test results were unreliable to show his BAC was 0.08 percent because, among other things, the breath test device had an inherent margin of error of .02 percent. The trial court denied the petition. Brooks's appeal followed. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On August 4, 2007, at 12:44 a.m., Brooks was pulled over by Officer J. Cummings¹ because of a broken taillight. Officer Cummings spoke to Brooks and observed symptoms of intoxication. Field sobriety tests were performed and Officer Cummings reported that Brooks had an unsteady gait, slurred speech, odor of alcohol, and bloodshot, watery eyes. Brooks admitted he had downed two 24-ounce beers about two hours before the traffic stop. Based on these facts, Brooks was arrested for driving under the influence of alcohol in violation of Vehicle Code section 23152. Brooks agreed to allow Officer Cummings to perform breath tests to measure Brooks's level of intoxication. The breath tests were performed at 1:02 a.m. and at 1:05 a.m., and each time Brooks's BAC registered at precisely 0.08 percent.

As a result of Brooks's arrest for driving under the influence, the DMV suspended Brooks's driver's license for a period of time. Brooks requested a hearing to contest the suspension and an administrative hearing was held before a DMV hearing officer on December 28, 2007. The evidence received by the hearing officer included the arrest

¹ Officer Cummings was an officer with the California State University, Fresno, Police Department.

forms prepared and signed under penalty of perjury by Officer Cummings, setting forth the recorded results of the two breath tests and other observations noted by Officer Cummings at the time of Brooks's arrest.

In his defense at the administrative hearing, Brooks submitted an affidavit from Jay B. Williams, a forensic toxicology expert. Williams also gave additional oral testimony at the administrative hearing. The substance of Williams's expert testimony was that the breath test results were unreliable because the device used to measure Brooks's breath had an inherent margin of error, or a variance, of 0.02 percent. Thus, according to Williams, Brooks's BAC may have been anywhere from 0.06 percent to 0.10 percent at the time of his arrest. Williams further challenged the accuracy of the breath test results on the ground that if the tested person's breath were higher or lower than 34 degrees centigrade, which is the standard temperature applied when the device is calibrated, the results will either overstate or understate the concentration of alcohol. Ultimately, the hearing officer concluded that Williams's testimony was not sufficiently persuasive or weighty to overcome the chemical (breath test) evidence that Brooks's BAC was 0.08 percent, and thus the suspension of Brooks's driver's license was upheld.

On February 1, 2008, Brooks filed a petition for writ of mandate in the superior court. Brooks's petition argued that the hearing officer erroneously discounted the expert testimony of Williams relating to the unreliability of the breath test results. Williams's expert testimony allegedly *required* the trial court to overturn the suspension because it meant there was no reliable evidence that Brooks's BAC was at least 0.08 percent at the time of his arrest. Consequently, there was insufficient evidence that his BAC was 0.08 percent when he was driving his motor vehicle. At the hearing on the petition, the trial court concluded, based on its review of the entire record, that the hearing officer's decision to sustain the suspension of Brooks's driver's license was within the lawful bounds of that hearing officer's discretion. Accordingly, the writ was denied.

Brooks's appeal followed. Brooks contends on appeal that the trial court's denial of the petition for writ of mandate was an abuse of discretion. Allegedly, the trial court should have granted the petition based on the "margin of error" expert testimony. We now consider Brooks's contentions.

DISCUSSION

I. DMV Administrative Hearing

We begin with a brief overview of the nature of what is generally referred to as a DMV "administrative per se" hearing, including the burden of proof. This, of course, was the administrative hearing Brooks received before a DMV hearing officer regarding the suspension of his driver's license.

"[T]he DMV bears the burden of proving by a preponderance of the evidence certain facts, including that the driver was operating a vehicle with a blood-alcohol level of 0.08 percent or higher. [Citations.] The DMV may satisfy its burden via the presumption of Evidence Code section 664. [Citation.] 'Procedurally, it is a fairly simple matter for the DMV to introduce the necessary foundational evidence. Evidence Code section 664 creates a rebuttable presumption that blood-alcohol test results recorded on official forms were obtained by following the regulations and guidelines of title 17 [of the California Code of Regulations (Title 17)]. [Citations.] ... The recorded test results are presumptively valid and the DMV is not required to present additional foundational evidence. [Citation.]' [Citation.] With this presumption, the officer's sworn statement that the breath-testing device recorded a certain blood-alcohol level is sufficient to establish the foundation, even without testimony at the hearing establishing the reliability of the test. [Citations.]" (*Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1232-1233; see also *Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 1003.)

Title 17 is that portion of the California Code of Regulations addressing standards and procedures required for blood-alcohol tests. "Title 17 contains various regulations

relating to the analysis of blood, breath, or urine samples to determine the alcohol content of the samples. (Title 17, §§ 1215–1222.2) With regard to breath samples, the Title 17 regulations address the collection and handling of the samples (Title 17, §§ 1219, 1219.3) and set forth standards governing the instruments and accessories that may be used to obtain and test the samples. (Title 17, §§ 1221.1, subd. (a), 1221.2, subd. (a), 1221.3.) The regulations also set forth procedures for administering breath tests, for determining the accuracy of the testing devices, for training persons who operate the devices, for recordkeeping related to the accuracy testing, and for expressing analytical results. (Title 17, §§ 1221.4, 1221.5.)” (*Molenda v. Department of Motor Vehicles*, *supra*, 172 Cal.App.4th at p. 1000.)

The statutory presumption that an official duty was regularly performed (Evid. Code, § 664) includes a presumption that a blood-alcohol test performed by law enforcement personnel—such as the breath test in the present case—was properly administered by a trained officer, using properly functioning equipment, all as required by Title 17. (*Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 142-143, 145.) This presumption justifies reliance by the DMV upon such test results to support a license suspension, subject to a showing by the licensee that the test was not performed in compliance with the standards of Title 17. (*Davenport v. Department of Motor Vehicles*, *supra*, at pp. 140-143.)

“Once the DMV establishes its *prima facie* case by presenting documents contemplated in the statutory scheme, the driver must produce affirmative evidence of the nonexistence of the presumed facts sufficient to shift the burden of proof back to the DMV. [Citations.]” (*Manriquez v. Gourley*, *supra*, 105 Cal.App.4th at p. 1233.) “The licensee must show, ‘through cross-examination of the officer or by the introduction of affirmative evidence, that official standards were in any respect not observed’ [Citation.] Once such showing has been made, the burden shifts to the DMV to prove that the test was reliable despite the violation.” (*Baker v. Gourley* (2000) 81 Cal.App.4th

1167, 1172-1173, quoting *Davenport v. Department of Motor Vehicles*, *supra*, 6 Cal.App.4th at p. 144.)

Here, the DMV hearing officer noted that the breath test was administered on “an approved device” under applicable regulations and that Brooks presented no evidence “that this machine was not properly calibrated, or not in proper working order at the time the breath test was administered.” In other words, Brooks failed to rebut the statutory presumption that the standards and procedures of Title 17 were followed. Accordingly, the statutory presumption provided a foundation for admissibility of the breath test results and allowed the hearing officer to rely on the results as evidence in support of suspension. The hearing officer did so and found the breath test results to be of greater weight than Williams’s expert testimony. The hearing officer also pointed out that the testimony relating to a potential variance in test results if breath temperature were appreciably above or below 34 degrees centigrade could mean that Brooks’s BAC was actually *higher* than as registered on the device, since Brooks offered no evidence of his own breath temperature or of how much alcohol he allegedly consumed (or when) that evening. In the final analysis, the hearing officer found the breath test results to be determinative.

II. Trial Court’s Denial of Writ of Mandate and Our Standard of Review

As noted, Brooks challenged the outcome of the DMV administrative hearing by filing a writ of mandate in the superior court. The trial court was required to “determine, based on its independent judgment, ““whether the weight of the evidence supported the administrative decision.””” (*Lake v. Reed* (1997) 16 Cal.4th 448, 456.) In exercising its independent judgment, the trial court was still required to afford “a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Fukuda v. City of Angels* (1999) 20

Cal.4th 805, 817.) Here, the trial court denied the writ. It concluded based on the entire record that the hearing officer was within his discretion in upholding the suspension.

On appeal, we ““need only review the record to determine whether the trial court's findings are supported by substantial evidence.”” (*Lake v. Reed, supra*, 16 Cal.4th at p. 457.) “““We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court’s decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court’s. [Citation.] We may overturn the trial court’s factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings. [Citation.]””” (*Ibid.*)

III. Substantial Evidence Supported Trial Court’s Denial of Writ

The purpose of the administrative per se hearing is to provide a summary procedure to protect the public against drunk drivers by imposing a temporary suspension of the driving privilege. (*Davenport v. Department of Motor Vehicles, supra*, 6 Cal.App.4th at p. 139.) “However, the interests justifying summary proceedings are not so great as to allow the suspension of a license absent a showing by substantial competent evidence of facts supporting the suspension.” (*Ibid.*) Here, Brooks challenges the sufficiency of the evidence to prove that he had a BAC of 0.08 percent.

In the administrative hearing, Brooks did *not* show noncompliance with Title 17, but instead asserted through Williams’s expert testimony that the type of device used in performing the breath tests (1) had an inherent margin of error of 0.02 percent and (2) had an additional variance in results if breath temperature differed from 34 degrees.²

² We note the foundation for Williams’s opinion that the device had an inherent 0.02 percent margin of error was not entirely clear. It appears his opinion was based on the fact that the regulations set forth minimum standards that allow a breath testing device to have a degree of accuracy that is less than 100 percent perfect. That is, Title 17 requires a breath testing device to be accurate to within 0.01 percent in laboratory tests, and when used in the field on human subjects the test results are considered valid if two

On appeal, Brooks contends that this evidence *required* the suspension to be set aside. We disagree. As we explain more fully below, due to the presumption of Evidence Code section 664, the breath test results were admissible in this case and could be relied on, in conjunction with other circumstantial evidence, to support the administrative suspension. That being the case, Williams's testimony went to the weight, not the admissibility of the breath test results, and the hearing officer was not constrained by the margin-of-error/variance evidence, but was entitled to consider all of the relevant evidence tending to support the finding that Brooks's BAC was 0.08 percent. We now elaborate.

In view of the statutory presumption of Evidence Code 664 that Title 17 standards and procedures were followed in regard to the breath tests, and of the failure of Brooks to rebut that presumption, the results of the two breath tests were clearly admissible and provided substantial evidence that Brooks had a BAC of 0.08 percent at the time of his arrest. (*Hernandez v. Gutierrez* (2003) 114 Cal.App.4th 168, 172, 176 [where driver fails to overcome presumption of Title 17 compliance, the test results are admissible and constitute substantial evidence of BAC]; *Davenport v. Department of Motor Vehicles*, *supra*, 6 Cal.App.4th at pp. 142-143 [failure to rebut presumption of compliance with Title 17 establishes basis for admission of test results and provides substantial evidence to support suspension of license].) The breath test evidence led to a further presumption in this case that Brooks was *driving* with a BAC of 0.08 percent. (Veh. Code, § 23152, subd. (b) [rebuttable presumption that BAC existed at time of driving if chemical test is performed within three hours after driving].)

tests are performed and the results are within 0.02 percent of each other. (Title 17, § 1221.4.) Williams did not provide a specific foundation for his conclusion that *this particular device*, the "AlcoTest 7410 Plus," had an inherent margin of error of 0.02 percent. Although not stated in the findings, the conclusory nature of Williams's opinion may have been one factor, among others, for concluding that the results set forth in the chemical test were more credible.

We assume that in a close case, evidence that the device used to test the driver's BAC had a particular margin of error could make a difference in whether or not the burden of proof in a license suspension hearing was satisfied. *However*, such margin-of-error evidence should not be considered in isolation from all the facts and circumstances of the case. Where there is a valid chemical test (as here) indicating a particular BAC, other circumstantial evidence of intoxication may be used to *corroborate* the accuracy of the chemical test. (*Baker v. Gourley* (2002) 98 Cal.App.4th 1263, 1269.) "A corollary to this commonsense point is that non-chemical test circumstantial evidence can shed light on whether the margin of error *in* a chemical test makes any difference." (*Ibid.*, fn. 2, citing *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 5-8 (*Randolph*).) Thus, "both parties are free to introduce circumstantial evidence bearing on whether the driver's [BAC] exceeded the permissible level. [Citation.] 'Evidence regarding the manner in which a defendant drove, performed field sobriety tests, and behaved is *admissible and relevant* as tending to establish that he did or did not have a 0.10 [now 0.08 BAC] while driving.' [Citation.]" (*McKinney v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 519, 526, fn. 6 (*McKinney*).)

In *McKinney*, the Court of Appeal found there was abundant evidence to support the appellant's license suspension because, in addition to the chemical test evidence, "[t]he hearing officer below had before him the California Highway Patrol officer's observations that McKinney was driving in an erratic and dangerous manner, that he had bloodshot and watery eyes, an odor of alcohol, an unsteady gait and slurred speech." (*McKinney, supra*, 5 Cal.App.4th at p. 526, fn. 6.) Similarly, in *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730 (*Jackson*), the Court of Appeal found the evidence was more than sufficient to uphold the suspension in that case, where the post-arrest breath test results were 0.08 percent, and such test results were further corroborated by circumstantial evidence of intoxication, including bloodshot and watery eyes, an odor of alcohol, an unsteady gait and slurred speech. (*Id.* at p. 741.) Although the *McKinney*

and *Jackson* cases did not involve the specific issue of margin of error, they serve to highlight the well-established principle that the accuracy of chemical test results may be corroborated by other circumstantial evidence of intoxication.

In *Randolph, supra*, 213 Cal.App.3d Supp. 1, which was an appeal from a criminal conviction under Vehicle Code section 23152, subdivisions (a) and (b), the appellate department addressed the issue of margin of error in the chemical test used to measure BAC. In that case, the appellant's breath test results registered at exactly 0.10 percent, which at that time was the minimum statutory threshold to constitute a violation of Vehicle Code section 23152, subdivision (b). An expert witness testified that the test instrument had a margin of error of approximately 0.010 percent, which meant that the appellant's actual BAC could be reasonably interpreted as between 0.09 and 0.11 percent. (*Randolph, supra*, at p. 5.) *Randolph* explained that the determination of whether the appellant did or did not have a 0.10 percent BAC while driving should be based on all the relevant evidence, including circumstantial evidence of intoxication such as "the manner in which a defendant drove, performed field sobriety tests, and behaved" (*Id.* at p. 7.) "In deciding appellant's guilt of ... driving with a blood-alcohol level of 0.10 percent or more, the jury was not required to assume that appellant's actual blood-alcohol level was at the low end of the margin of error, nor was the jury precluded from considering all the other evidence in the case besides the breath test. Considering all the evidence, and the inferences that could reasonably be drawn therefrom, we find that a reasonable trier of fact could find appellant guilty beyond a reasonable doubt. The evidence is therefore sufficient to support the conviction." (*Id.* at p. 12.)³

³ *Randolph* disagreed with an earlier appellate department opinion, namely *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, which held that to prove BAC beyond a reasonable doubt the test results had to show the defendant's BAC was unlawful by an amount that exceeded the margin of error and no consideration was given to other circumstantial evidence. We believe *Randolph* is correct. Of course, both opinions involved the burden of proof in a criminal case of guilt beyond a reasonable doubt, while

Applying these principles to the present case, we conclude there was sufficient evidence to support the conclusion that Brooks's BAC was 0.08 percent. Two breath tests were administered by the police officer and both showed a BAC of 0.08 percent. Moreover, those chemical test results were corroborated by other circumstantial evidence of intoxication, including red, watery eyes, odor of alcoholic beverage, slurred speech and unsteady gait.⁴ In addition, Brooks admitted that he had consumed two 24-ounce beers within two hours of being stopped by Officer Cummings. Under all the facts, the hearing officer was not required to find that Williams's testimony regarding possible margin of error or variance outweighed the evidence that Brooks's BAC was at least 0.08 percent. Indeed, based on the entire record, it appears to us that the weight of evidence supported the decision to suspend Brooks's license. Because the administrative suspension in this case was supported by substantial evidence, we affirm the trial court's denial of the petition for writ of mandate. (See *Davenport v. Department of Motor Vehicles*, *supra*, 6 Cal.App.4th at p. 137.)

Our conclusion is not altered by Williams's testimony of a possible variance in the results if the tested person's breath temperature is higher or lower than 34 degrees centigrade. According to Williams, the breath testing machines are calibrated in the laboratory using gas that is 34 degrees centigrade because the average breath temperature of a person is 34 degrees centigrade. From this fact, Williams extrapolated that if the subject's breath temperature were not 34 degrees, it would vary the results of the breath test. The problem is that even assuming Williams's analysis is correct, there was absolutely no evidence presented at the hearing that Brooks's breath temperature was

here the burden in the license-suspension hearing was only preponderance of the evidence.

⁴ Since Officer Cummings administered field sobriety tests, the unsteady gait reported by him was presumably observed in connection with Brooks's performance on the "walk & turn" test.

higher or lower than 34 degrees, hence no irregularity in this particular test was shown. Additionally, according to Williams's own concession, if Brooks's breath temperature were lower than 34 degrees, the results of the test would have registered lower and Brooks's actual BAC could have been higher than 0.08 percent. We agree with the DMV that the asserted variance based on temperature of breath was mere speculation or of such remote evidentiary value that it was properly disregarded.

As there was substantial competent evidence that Brooks's BAC was 0.08 percent, the DMV properly suspended Brooks's driver's license and the superior court correctly denied Brooks's petition for writ of mandate.

DISPOSITION

The judgment is affirmed.

Kane, J.

WE CONCUR:

Wiseman, Acting P.J.

Levy, J.